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1975

# Norma Kocha v. Gibson Products Company, A Utah corporation and Maytex Manufacturing Company, A Texas Corporation v. Universal Carrier Company, A corporation : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT  
BRIEF

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BRIGIAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

NORMA KOCHA,

*Plaintiff,*

vs.

GIBSON PRODUCTS COMPANY, A  
Utah Corporation, and MAYTEX  
MANUFACTURING COMPANY, A  
Texas Corporation,

*Defendants.*

MAYTEX MANUFACTURING COM-  
PANY, A Texas Corporation,  
*Third-Party Plaintiff-Appellant,*

vs.

UNIVERSAL CARRIER COMPANY,  
A Corporation,

*Third-Party Defendant-Respondent.*

Case No.

13887

APPELLANT'S BRIEF ON APPEAL

Appeal from a Decree of the  
Third Judicial District Court of Salt Lake County  
Honorable Maurice D. Jones, Judge

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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NORMA KOCHA,

*Plaintiff,*

vs.

GIBSON PRODUCTS COMPANY, A  
Utah Corporation, and MAYTEX  
MANUFACTURING COMPANY, A  
Texas Corporation,

*Defendants.*

Case No.

13887

MAYTEX MANUFACTURING COM-  
PANY, A Texas Corporation,

*Third-Party Plaintiff-Appellant,*

vs.

UNIVERSAL CARRIER COMPANY,  
A Corporation,

*Third-Party Defendant-Respondent.*

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APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF THE KIND OF CASE

This is an action for personal injuries allegedly suffered by plaintiff who was a business invitee on the premises of Gibson Discount Center in Murray, Utah.

The named defendants were Gibson Products Company, a Utah Corporation, (referred to hereafter as "Gibson"), the owner of the store, and Maytex Manufacturing Company, a Texas Corporation, (referred to hereafter as "Maytex"), who supplied certain metal display racks to the store.

### DISPOSITION IN THE LOWER COURT

Defendant, Maytex, filed a Third-Party Complaint against Universal Carrier Company, a Texas Corporation, (referred to hereafter as "Universal"). Upon motion of Universal, the Third-Party Complaint was dismissed for lack of jurisdiction by the Honorable Maurice D. Jones, sitting as a Judge in the Third Judicial District.

### RELIEF SOUGHT ON APPEAL

Appellant, Maytex, seeks a reversal of the Order of the District Court dismissing the Third-Party Complaint.

### STATEMENT OF FACTS

Plaintiff in this action claims to have suffered personal injuries when she struck her leg on a wire merchandise display rack which allegedly was protruding into the aisle when she was shopping at the Gibson Discount Center. In her Complaint, she seeks damages against Gibson, the store owner, and against Maytex, whom she alleges supplied the display racks to the store (R-1). The allegations against Maytex are that the display racks were defectively designed and manufactured and sepa-

rate causes of action are set forth in the pleadings based upon negligence, breach of warranty and strict liability in tort (R-1).

After the Complaint was filed, Maytex filed a Third-Party Complaint against Universal pursuant to Rule 14, Utah Rules of Civil Procedure. The allegations in the Third-Party Complaint are to the effect that the display rack in question had been designed and manufactured by Universal, and in the event Maytex is liable to plaintiff, then in such event, Universal would be liable to Maytex under principles of common law indemnification (R-15). Universal was served with process in Texas pursuant to the Utah Long-Arm Statute (Title 78, Chapter 27, *Utah Code Annotated*).

Universal filed a Motion to Dismiss, alleging that it was not subject to jurisdiction in the courts of the State of Utah (R-31). The Motion was supported by an Affidavit of an officer of the corporation stating merely that Universal is not licensed to do business in Utah and does not sell its products directly to buyers within the State of Utah (R-33). There is nothing in the affidavit disputing the allegations of Maytex in its Third-Party Complaint that Universal was, in fact, the manufacturer and designer of the display rack. Nor is there anything in the affidavit indicating that Universal did not purposefully intend its products to come into the State of Utah. Nor is there anything to even indicate that the sale in question involved an isolated transaction; for all we know from the state of the record, the

respondent may well have thousands of its manufactured products in use in stores throughout the State of Utah. All of these facts would have to be considered in the light most favorable to Maytex for the purpose of the Motion to Dismiss.

The trial court granted Universal's Motion to Dismiss which is the judgment from which Maytex appeals. The issue on appeal is thus whether an intermediate seller (such as a wholesaler or distributor) of an allegedly defective product causing injury in Utah can invoke long-arm jurisdiction over the designer and manufacturer from which it purchased the product outside of the state.

The Order of the District Court dismissing the Third-Party Complaint is a final order as between the Third-Party plaintiff and Third-Party defendant. The plaintiff's theory of recovery is based upon joint and several liability. The plaintiff is not concerned about whom she collects from. Whether or not the appeal is affirmed or reversed will not affect the final determination of the issues remaining between the plaintiff and other defendants. Under such circumstances, the authorities generally hold that the interests of the parties are severable and the dismissal of the Third-Party Complaint would constitute a final judgment from which an appeal would lie. *Attorney General of Utah v. Pomeroy, et al.*, 93 Utah 426, 73 P. 2d 1277; *Keenan v. Dean*, 134 C. A. 2d 189, 285 P. 2d 300; *Oaks v. Rojcewicz*, Alaska, 409 P. 2d 839; *Bear River Valley Orchard Company v. Hanley*, 15 Utah 506, 50 P. 611.



## ARGUMENT

## POINT I.

THE DISTRICT COURT HAS JURISDICTION OVER THE THIRD-PARTY DEFENDANT IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 27, TITLE 78, UTAH CODE ANNOTATED (LONG ARM STATUTE).

Section 78-27-24, Utah Code Annotated, enumerates the type of activity that will subject a non-resident to jurisdiction in the Utah State Courts. Among the activities listed is subsection (3):

“The causing of any injury within this state, whether tortious or by breach of warranty.”

The intent of the legislature in adopting the Utah Long Arm Statute is to “insure maximum protection to citizens of this state” and “to assert jurisdiction over non-resident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.” Section 78-27-22.

Most Utah Cases concerning application of the Long Arm Statute have dealt with Section 78-27-24(1) “the transaction of any business within this state.” See *Foreign Study League v. Holland-American Line*, 27 Utah 2d 442, 497 P. 2d 244 and *Hill v. Zale Corporation*, 25 Utah 2d 357, 482 P. 2d 332. These cases both discuss

the question of whether the business activities within the state are significant enough to constitute minimum contacts thus justifying inpersonam jurisdiction. One of the few Utah cases dealing with section 78-27-24(3) is *Hydroswift Corporation v. Louie's Boats and Motors, Inc.*, 27 Utah 2d 233, 494 P. 2d 532. In *Hydroswift* the tortious activity alleged was a conversion of title to some boats in Oregon. The tortious activity did not take place in Utah and thus jurisdiction was lacking.

Section 78-27-24(3) extends personal jurisdiction to non-residents causing "any injury within the state whether tortious or by breach of warranty". Personal jurisdiction is wholly dependent upon the defendant's alleged tortious conduct and not upon his previous business relationship with Utah residents. However, this section is limited by the due process requirements of the Fourteenth Amendment of the United States Constitution. It is significant to note that the United States Supreme Court held in *International Shoe Company v. State of Washington*, 326 U. S. 310, 313, 66 S. Ct. 156 (1945), that certain "acts" because of their nature and quality and circumstances of their commission, may be deemed sufficient to render the [non-resident] liable to suit. By citing tortious injury cases involving non-resident motorists, the court inferred that even an isolated instance of tortious conduct is a sufficient "act" for establishment of minimum contacts.

In applying minimum contacts to the express language of the Utah Statute, a Note, Inpersonam Jurisdic-

tion Expanded: Utah's Long-Arm Statute, 1970 Utah L. Rev. 222 is very helpful. At page 236 of this article the author states:

In applying the Supreme Court standards to tort and breach of warranty cases, State Courts have required varying amounts of activity before assuming personal jurisdiction. They uniformly uphold personal jurisdiction over a non-resident who physically enters a state and commits a tort. Courts, however, have been more reluctant to assume personal jurisdiction over out-of-state manufacturers whose only contact with the forum state is the presence of the defective product. This reluctance has been especially noticeable when the particular state long arm statute limits jurisdiction to "commission of the tortious act *within* the state." Some courts interpreting this language have concluded that the tortious act of manufacturing occurred outside the state and is therefore not within the ambit of the statute. Other courts have circumvented this language by reasoning that the injury is actually the culmination of the tortious act. Because the Utah Act only requires a "*causing* of injury within the state", the situs of the tortious act is immaterial.

This reasoning is supported by the decision in *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill. App. 2d 432, 176 N. E. 2d 761 (1961). In *Gray* it was held that a foreign corporation which sold component parts of water heaters purposefully intended that

the parts be used in other states even though this inference was not supported with direct evidence. The Nevada Supreme Court has held in *Metal-Matic, Inc. v. Eighth Judicial District*, 82 Nev. 263, 415 P. 2d 617, that a non-resident manufacturer's activity was purposeful if it could have reasonably foreseen Nevada as a market for its product. In *Buckeye Boiler Company v. Superior Court*, 80 Cal. Rptr. 133, 458 P. 2d 57 (1969), the non-resident manufacturer was subjected to inpersonam jurisdiction because the non-resident manufacturer "did not allege . . . that the tank . . . arrived in California in a manner so fortuitous and unforeseeable as to demonstrate that its placement here was not purposeful". No such allegation has ever been made by the respondent manufacturer in the instant case.

The case of *Mountain States Sports, Inc. v. Sharman*, 353 F. Supp. 613 (1972), examines in detail the requirements for due process under section 78-27-24(3). This case involved the defendant's alleged tortious interference with a personal service contract within Utah. The defendant's request to quash service under the Utah Long-Arm Statute was denied. In this well-reasoned opinion District Judge Aldon J. Anderson reduced the Fourteenth Amendment question of due process to "the twin tests of fairness-resonableness to the defendant on the one side and territorial respect for sister states due spheres on the other."

In considering the test of fairness-reasonableness the court lists a number of factors to be considered.

“Fairness and reasonableness to the present defendants may be measured by a number of factors including the foreseeability of the alleged injury in Utah, the extent to which defendants engage in interstate commerce and to which they have sought the protection of the state, the nature and seriousness of alleged injury and the general convenience of defending in Utah.”

In the case before the court all of these factors are met. By purposefully placing the rack in interstate commerce it is foreseeable that an injury could result in Utah. It is undisputed that the respondents are engaged in interstate commerce and are thus beneficiaries of the protection of the Utah State Laws. It is true that the respondents had no contact with Utah when the rack was first placed into the flow of interstate commerce, however, the injury involved is of a very personal nature and thus enhances Utah's interest in serving as the forum. On this basis the requirements of fairness and reasonableness to the respondent is not offended by a finding of jurisdiction.

Judge Anderson points out that the test of “territorial respect for sister states due spehres” is that if the forum state has “sufficient contacts with the transaction or a party to make it, in relation to other states, a logical forum for adjudication”. While both appellant and respondent are Texas Corporations their contacts with Utah in the situation before the court are greater than

with any other sister states. Thus Utah is the proper forum in relation to the present dispute.

In finding personal jurisdiction in the *Sharman* case under section 78-27-24(3), Judge Anderson holds that all that is necessary before proceeding to trial is a "good faith allegation of injury". Omitting Citations. Since the jurisdictional question is closely tied to the merits of the case "its final determination is better postponed until trial in order to prevent a summary decision on the merits without the ordinary incidents of the trial including the right to jury".

Perhaps the strongest authority supporting appellant's position is the very recent case of *Pellegrini v. Sachs & Son*, ..... Utah 2d ....., 522 P. 2d 104 (1974). In this case the court held that this section of the Long-Arm Statute did not extend to a dealer who sells goods which come into the state. However, the court makes a distinction between a dealer and a manufacturer whose products do come into the state purposefully.

It is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

In her "situs of causation" argument plaintiff cites a number of cases as being quite liberal in approving jurisdiction over non-residents in the states where products have caused injury. But it will be found that most of those cases

are against manufacturers. The adjudications are on the ground that in sending their wares into foreign states they have a substantial and continuing interest in the sale and distribution; and that their conduct through their agents in promoting those objectives is sufficient to meet the "minimum contacts" test.

We are cognizant that our ruling herein makes what may be regarded as a somewhat technical distinction between those adjudications as to manufacturers, and the situation presented here, concerning a dealer. But we think that distinction is both correct under the law and justified as a matter of policy. Differing from the manufacturer, a dealer (defendant Sachs) has little or no interest in the sale of similar products in the foreign state.

The distinction made in the *Pellegrini* case between a dealer and a manufacturer is directly in point in the instant case. The manufacturer of products sold in interstate commerce such as display racks for large merchandising stores has a substantial and continuing interest in marketing its products beyond the boundaries of the state where the manufacturing took place. It cannot insulate itself from suit by selling through a wholesaler or other intermediary who in turn sells the product in the State of Utah. The very purpose of the Long-Arm Statute is to pierce this type of jurisdictional veil. This is the thrust of the *Pellegrini* case and the reason why the court made the very logical distinction between a manufacturer and a dealer; a manufacturer normally has

an interest in marketing its products anywhere they can be sold, while a dealer normally has no interest in selling beyond its local marketing area. The respondent's tortious activity is a sufficient minimum contact with the State of Utah to impose jurisdiction under the Long-Arm Statute. The respondent's product found its way into Utah in a natural, foreseeable and purposeful manner. Respondent has therefore purposefully availed themselves of the business climate that exists within Utah, thereby meeting the minimum contacts of due process established by the Fourteenth Amendment of the United States Constitution.

### CONCLUSION

Based upon all of the arguments and authorities as cited herein, appellants respectfully request the court to reverse the judgment of the trial court.

Respectfully submitted,

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